



POLICE DEPARTMENT

-----X
In the Matter of the Disciplinary Proceedings :

- against - :

Lieutenant Jerald Lavery :

Tax Registry No. 913157 :

Military and Extended Leave Desk :

FINAL

ORDER

OF

DISMISSAL
-----X

Lieutenant Jerald Lavery, Tax Registry No. 913157, [REDACTED],

having been served with written notice, has been tried on written Charges and Specifications numbered 85226/09 as set forth on form P.D. 468-121, dated February 25, 2009, and Charges and Specifications numbered 85876/09 as set forth on form P.D. 468-121, dated October 27, 2009, and after a review of the entire record, has been found Guilty as Charged.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Lieutenant Jerald Lavery from the Police Service of the City of New York.

A handwritten signature in black ink, reading "Raymond W. Kelly".

RAYMOND W. KELLY
POLICE COMMISSIONER

EFFECTIVE: On November 10, 2011 @ 0001hrs

COURTESY • PROFESSIONALISM • RESPECT



POLICE DEPARTMENT

March 9, 2011

-----X
In the Matter of the Charges and Specifications : Case Nos. 85876/09 &
- against - : 85226/09
Lieutenant Jerald Lavery :
Tax Registry No. 913157 :
Military and Extended Leave Desk :
-----X

At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Claudia Daniels-DePeyster
Assistant Deputy Commissioner - Trials

APPEARANCE:

For the Department: Pamela Naples, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent: Philip Karasyk, Esq.
Karasyk & Moschella, LLP
225 Broadway – 32nd Floor
New York, New York 10007

To:

HONORABLE RAYMOND W. KELLY
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

COURTESY • PROFESSIONALISM • RESPECT

The above-named member of the Department appeared before the Court on August 11, October 15, and October 29, 2010, charged with the following

Disciplinary Case No 85226/09

1 Said Lieutenant Jerald Lavery, assigned to the 48 Precinct, on or about February 24, 2009, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Lieutenant did wrongfully and without just cause duplicate and utilize an NYPD Parking Permit without permission or authority to do so

P G 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT –
PROHIBITED CONDUCT

Disciplinary Case No 85876/09

1 Said Lieutenant Jerald Lavery, assigned to the 48 Precinct, on or about and between July 14, 2009 and October 14, 2009, did engage in conduct prejudicial to the order, efficiency or discipline of the Department in that said Lieutenant did wrongfully ingest marihuana without police necessity or authority to do so

P G 203-10 Page 1, Paragraph 5 - PROHIBITED CONDUCT

2 Said Lieutenant Jerald Lavery, assigned as indicated in Specification No 1, on or about and between July 14, 2009 and October 14, 2009, did engage in conduct prejudicial to the order, efficiency or discipline of the Department in that said Lieutenant did wrongfully possess marihuana without police necessity or authority to do so

P G 203-10, Page 1, Paragraph 5 - PROHIBITED CONDUCT

Respondent, through his counsel, entered a plea of Not Guilty to Disciplinary Case No 85876/09 and a plea of Guilty to Disciplinary Case No 85226/09 A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review

DECISION

Disciplinary Case No 85226/09

Respondent, having Pleaded Guilty, is found Guilty as charged

v Case No 85876/09

Respondent is found Guilty

SUMMARY OF EVIDENCE PRESENTED

The Department called Dr Thomas Cairns and Police Officer Frank Arayaes as witnesses

Dr. Thomas Cairns

Cairns is currently employed as the Senior Scientific Advisor at Psychomedics Corporation (Psychomedics), a drug testing laboratory, where he is responsible for the development of testing methods and standard operating procedures. He is also responsible for the submission of these methods for clearance by the Food and Drug Administration (FDA)

Cairns holds a Bachelor of Science with honors and a PhD in biochemistry. In he has received a post-doctorate degree, a Doctor of Science in toxicology, from the University of Glasgow. He is certified by the New York State Department of Health to practice forensic toxicology with a particular regard to forensic hair testing. He needs to renew this licensing every three years and it was last renewed in December 2009. Similarly, Psychomedics itself is licensed as a laboratory by New York State to conduct

hair testing. He has written over a hundred peer-reviewed articles and a dozen books that have been published over the course of his career. publications have dealt with the hair testing process. He has been involved in the hair testing industry for over 20 years and has presented to the Society for Forensic Toxicology and the Society of Hair Testing.

On *voir dire*, Cairns testified that the science of mass spectrometry is constantly evolving, as instruments become more sensitive and efficient. According to his curriculum vitae [Department's Exhibit (DX) 1], the last time he had anything published on the subject of toxicological research was in 1980, the last animal study he conducted was in 1981, his last publication on mass spectrometry was in 1995, his last publication on spectroscopic technique was in 1979, and his last publication on hair testing was in 2007. Cairns explained that he has written more recent reports, but he did not list them on the curriculum vitae because they did not meet the standard of peer review. Based on his qualifications, Cairns was deemed an expert witness in the field of toxicology and hair testing analysis.

On further direct examination, Cairns testified that when a person ingests a compound like marijuana, it enters the liver, where it becomes metabolized. Marijuana is converted to a metabolite called carboxy tetrahydrocannabinol (THC). THC is unique to marijuana. The circulatory system brings the THC to the base of the hair follicle, where the metabolite becomes trapped in the structure as hair grows. In other words, every use of marijuana is captured by hair. Also, because the metabolite is not present in marijuana smoke, it cannot be caused by external contamination, with the possible exception of unusual sexual practice.

The Department collects three hair samples from each test subject. Psychemedics receives two of the samples in individually packaged tamper-evident envelopes. Testing is not conducted on samples that arrive in envelopes with broken seals. Each sample that proceeds to testing is given a unique identification number and bar code. After a sample is dissolved, it undergoes a screening test, which involves a complex biochemical process called radioimmunoassay. If this test finds that there was drug present at or above the confirmation test. Cairns explained that having an administrative cutoff differentiates clearly between a drug user and someone who may have been passively exposed, such as a person who inhaled secondhand smoke. The cutoff level used by Psychemedics and the Department in marijuana cases is one pictogram per ten milligrams (10 pg/10 mg) of hair.

The confirmation test at Psychemedics involves the technology known as mass spectrometry. For this test, a new quantity of hair is taken from the original sample envelope and washed three times to remove potential external contaminants. Cairns explained that because a marijuana smoker can sweat out the drug through scalp pores, the aggressive washing procedure also ensures that none of the sweat contamination remains. The hair is then dissolved and undergoes a process which uniquely identifies the structure of THC. After the test, a certifying scientist reviews all paperwork before negative results. In positive cases, Psychemedics washes and conducts mass spectrometry on the second hair sample received from the Department. Only in cases where both the first and second confirmation tests have positive results will Psychemedics report a positive outcome to the Department.

A Laboratory Data Package is a collection of all the chain of custody documents that the laboratory depended on to support a positive test. Cairns reviewed and certified the Laboratory Data Package for Respondent's hair samples. It indicates that the first sample was collected on October 14, 2009 and received by Psychemedics two days later. This sample consisted of body hair approximately a half-inch long. The report on that sample, issued on October 23, 2009, indicated that it was presumptive positive and confirmed by mass spectrometry at a level of 6.0 pg/10 mg (six times the administrative cutoff). The report further indicated that mass spectrometry on a second sample had an identical result of 6.0 pg/10 mg. According to Cairns, these test results clearly indicate ingestion of marijuana on multiple occasions prior to the date of collection. [DX 2 is a copy of the Laboratory Data Package for Respondent's samples. Respondent was identified by subject identification number 22-4717-09-XH. The first sample was identified as laboratory accession number 116324566, and the second sample was number 410020562.] On *voir dire*, Cairns testified that he has no recollection of being present in the laboratory on the days that the tests on Respondent's hair samples were conducted.

On cross-examination, Cairns testified that he has worked for Psychemedics for more than 20 years. The company, which has had a contract with the Department since the early 1990s, has received clearance from the FDA. This means that the FDA has deemed the devices that Psychemedics uses for determining users of marijuana to be safe, reliable, effective, precise, and accurate. This clearance process consists of the submission and presentation of information to the FDA. While FDA personnel have never actually inspected the laboratory, on-site inspections have been conducted by the

College of American Pathologists and state agencies. The College of American Pathologists did not find any deficiencies during its inspection. The only deficiency that the New York State Department of Health found was that one laboratory employee did

vitae on file

Cairns was not present when Respondent's hair samples were weighed. Although the scales in the laboratory are calibrated regularly, Cairns did not know exactly when the scale that was used to weigh Respondent's samples was calibrated last. Scales are checked at all inspections. Cairns reiterated that he was not present in the laboratory when Respondent's hair samples were tested. When asked about the lab employees who conducted the tests on Respondent's samples, Cairns stated that he was unaware of any of them ever being disciplined for infractions in work performance. During his entire time as laboratory director, Cairns has never found any laboratory employee to be in violation of the standard operating procedure.

Upon questioning by the Court, Cairns testified that the hair samples taken from Respondent had a "look-back period" of several months.

Arayaes, a 23-year member of the Department, is currently assigned to the Medical Division, where he has worked in the Drug Screening Unit for eight years. He has received training in hair collection from both the Department and Psychomedics. Before becoming certified to collect hair samples, he was required to pass a test on the subject. He collects approximately 40 hair samples each week.

On October 14, 2009, Arayaes collected three hair samples and two urine samples from Respondent. Arayaes testified that he had an independent recollection of taking Respondent's samples that day because he was struck by how quiet Respondent was during the hair collection process. He also remembered Respondent stating that he was "going to be a while" when it was time to collect the urine samples. Arayaes described Respondent as seeming "a little perturbed." He also remembered having a conversation with Respondent about the Bronx while collecting the urine.

Arayaes explained that before any samples are taken from a member of the service, the member is verified against his Department identification card. Fingerprints are also taken for identification purposes. The testing room has two testing tables in it. The tables are in separate corners of the room. A table is cleaned with alcohol and covered with a fresh sheet of paper before samples are taken. The razor being used is also sprayed with alcohol, as is the leg if hair is being taken from the leg. After the collector collects enough hair for three samples, each sample is wrapped in foil and placed in a sample acquisition card. The sample acquisition cards are closed with security seals and then placed in a plastic bag, which also gets sealed. The member initials the sample acquisition cards and the plastic bag. [The sample acquisition card initialed by _____ day of his sample collection can be found on page seven of the Laboratory Data Package (DX 2).] The member also signs Custody and Control Forms. The collector's hands are gloved throughout the process.

On October 14, 2009, Respondent prepared a Drug Screening Questionnaire. Both Respondent and Arayaes signed at the bottom of the form. The form indicates that

Respondent was assigned identification number 22-4714-09-XH Respondent's right index fingerprint appears in the corner Respondent indicated on the form that he was on one prescription medication (Levothyroxine) [DX 3 is a copy of this questionnaire]

Two of Respondent's hair samples were sent to Psychemedics A Custody and Control Form was attached to each of these samples The form for each sample was signed by both Respondent and Arayaes Respondent's identification number also appears on both forms [DX 4 and 5 are copies of the forms On both forms, Respondent signed under a donor certification stating, "I certify that I am the test subject, that the sample contained in the envelope is my sample, that it was cut close to the skin, and I witnessed the sample collector seal the sample envelope"]

Nobody else was in the testing room when Arayaes collected Respondent's hair samples Arayaes collected the samples from Respondent's leg because the hair on his head was just medium length At no point during the collection process did Respondent object that he could not see what Arayaes was doing At no point did Respondent ask Arayaes questions about the process or express concern After the collection, the samples were placed inside a safe While two of the samples were subsequently sent to Psychemedics, Respondent's third sample was kept locked up Once Psychemedics notified the Department of Respondent's positive test results, Respondent had the opportunity to send the third sample to a different laboratory for testing To his knowledge, Respondent never opted to have the third sample tested

On cross-examination, Arayaes testified that although he remembered Respondent signing the necessary paperwork, he did not know if Respondent actually read the documents in Arayaes

presence Respondent's leg was on the testing table while Arayaes shaved off the hair samples from the leg. Arayaes stood to the side of the leg while shaving. While this gave Respondent a view of the sample collection, it is possible that Arayaes' arm blocked Respondent's view for a second or two. Arayaes could not recall what he or Respondent was wearing that day, nor could he recall what he had for lunch that day, what day of the week it was, or what the weather was like. Respondent was the first person that he collected samples from that day. Arayaes could not recall the member of the service who followed Respondent or the third person he saw that day. He has collected approximately 1,600 samples since the day he collected from Respondent.

Arayaes reiterated that he recalls collecting Respondent's samples. He conceded however that he could not say for certain that his recollection was clear. He asked Respondent if he wanted the samples to be taken from the head or the leg. Arayaes explained that because the length of the hair on Respondent's head was medium, taking samples from there might have left a bald spot. The length of the hair on Respondent's head was approximately an inch, but Arayaes could not quantify exactly what he meant by "medium." Samples taken from the head must be an inch-and-a-half long, and ninety-nine percent . . . from the leg on male members of the service.

Respondent was cooperative throughout the collection process. The entire process lasted 15 or 20 minutes. A new razor is used for each collection. When Arayaes placed Respondent's samples in foil, the hair did not fill the foil. It has been several years since Arayaes last received training on the subject of hair collection, but he reviews the Psychomedics training manual every once in a while. He has never been disciplined

for or received reinstruction on the manner in which he does his job [Respondent s Exhibit A is a copy of a page from the Psychomedics Sample Collection Training Manual It reads, 'Head hair is always preferred, but occasionally a test subject may be completely bald, or have less than a half-inch of hair on their head In these cases a sample of body hair may be submitted ' The manual goes onto read, The body hair sample should fill the foil '"]

On redirect examination, Arayaes testified that he received the training manual from Psychomedics approximately ten years ago Since that time, he has received additional training from Quest Laboratories He has never been told by a supervisor that hair samples should be taken only from the head, nor has Psychomedics ever informed the Department that taking samples from the leg is improper Arayaes stated that even though the hair did not fill the foil, he knew based on his experience that the amount of hair taken for Respondent's samples was sufficient to conduct the tests Had the quantity of hair been insufficient, Psychomedics would have been unable to do the testing Respondent was given an opportunity to read every document that he signed

Respondent s Case

Respondent called Sergeant Juanita Mills as a witness and testified in his own behalf

Sergeant Juanita Mills

Mills, a 20-year member of the Department, is currently assigned to the 48 Precinct Between early 2007 and October 2009, Respondent was her platoon

commander at the precinct. They also socialized together off duty at precinct functions. Mills described Respondent as an excellent supervisor. She also described him as fair, knowledgeable, even-keeled, and "straight and narrow." Respondent was also health-conscious, as he ate healthy foods and went to the gym everyday on his meal break. Respondent did not smoke, and he and Mills discussed their shared dislike of smokers. Mills never observed Respondent unfit for duty. She replied negatively when asked if she could conceive any circumstances under which Respondent would smoke marijuana. She was shocked to learn of the test results, and she believes that there was some sort of mistake in the testing process.

On cross-examination, Mills testified that although she and Respondent worked the same tour, they did not always work together. She would not know what Respondent's habits were like while they were apart. Other than precinct functions, they did not socialize together off duty. She, therefore, would not know what his life was like outside of work. Mills described herself as a "pretty good judge of character."

Upon questioning by the Court, Mills testified that Respondent always looked clean cut with "everything done the way it was supposed to be done." She never saw him report to work disheveled or unkempt.

Respondent

Respondent is a 25-year member of the Department. He has always been rated above standards and has never before been the subject of Department charges. [REDACTED]

[REDACTED] On October 12, 2009, Respondent's command received a notification for Respondent to report to the Medical Division for a drug test.

Because he was already in the midst of working the Columbus Day Parade, however, the Medical Division told his command to disregard the notification. Respondent realized at the time, though, that he would be called again for a drug test later in the week. The

Between the first and second notifications, Respondent did not call in sick, put in for vacation, or take any other steps to avoid going for a drug test. He stated, "I have about eight, nine months on the books, plus terminal leave. I can go 11 months on the books without coming to work. If I was doing anything wrong, anything at all wrong, believe me, I would have had six months of papers put in, and I would have been on a plane somewhere. Why would I walk into a Dole test knowing I am smoking or doing something?"

Respondent testified that when he reported to the Medical Division on October 14, 2009, he was the only person there dressed in uniform. While waiting for the collection to begin, he spoke and joked around with the three other people in the waiting room. When Arayaes took him into the testing room, there was a sheet of paper already wipe the table down with alcohol. Respondent and Arayaes agreed that the samples would be taken from the leg. Arayaes sprayed Respondent's leg with alcohol but did not spray the razor. Respondent did not see Arayaes cutting the hair because Arayaes was standing in front of him, blocking the view. At one point when Respondent started to move, Arayaes yelled at him not to move. Respondent described Arayaes as disorganized and nervous. It seemed to him like Arayaes was overwhelmed.

Respondent was shocked to learn that his samples tested positive for marijuana. He has no idea how this happened to him. It must be some sort of mistake. The only

time he has ever smoked marijuana was when he was 16 or 17 years old. He tried it once and had a bad experience. It made him shake, his heart beat fast, and he became paranoid. He vowed at that time to never use marijuana again. He has not consumed any illegal drugs since. Ten years ago, he kicked his teenage son out of the house when he suspected him of smoking marijuana.

On cross-examination, Respondent testified that he was aware that members of the service who test _____ He has had no desire to smoke marijuana. If he had that desire, though, he would have _____

tests, including hair tests. He was aware of the testing procedures, collection process, and related paperwork. Because he knew that he was going to be called for a test that week, he [REDACTED]

██████████ This was the medication he listed on his Drug Screening Questionnaire. He did not read every form that he initialed that day because he did not have his glasses with him. At no point during or after the sample collection did he tell Arayaes that he could not see what was going on or that he had an issue with the process. He stated in a February 2010 official Department interview that he was not really paying attention during the collection. He felt the razor on his leg as Arayaes collected the samples.

In 2007, Respondent made a copy of his Department parking permit because he wanted to have a permit for both of his cars. In 2009, he was still using the duplicated 2007 permit. In February 2009, he displayed the permit when he parked at a bus stop near court. He parked at the bus stop because he was scheduled to testify before the

grand jury, and he did not want to be late. He did not realize at the time that this conduct was improper.

On redirect examination, Respondent testified that he was not really paying attention during the hair collection process because he felt that there was nothing for him to be concerned about. If he retired now, his pension would be approximately \$70,000 a year. In addition, he would be paid the variable supplement and receive health benefits. He was aware that he would lose everything if he is terminated for failing a drug test.

Upon questioning by the Court, Respondent testified that he has been [REDACTED]. [REDACTED] He had been subjected to a couple of previous hair tests. He could not recall if the hair was taken from his leg for those previous tests. When Arayaes was finished cutting the samples, Respondent bent down to tie his boot. By the time he picked his head up approximately 15 seconds later, the samples had already been packaged. For this reason, he never actually saw Arayaes place the samples in foils. Respondent never sent his third hair sample out for testing. The tests conducted on Respondent's urine came back with negative results.

On continued redirect examination, Respondent testified that he wanted to be a police officer since the time he was a child.

Upon further questioning by the Court, he stated that the medication for his [REDACTED] condition is the only prescription medication he takes. He also buys products at GNC. When he was informed that he failed the drug test, the first thing he thought of was that the test must have picked up some sort of GNC supplement or steroid that he had taken. He did not check to see if any of his GNC supplements contained anything that could be related to marijuana. Because of his [REDACTED], he has his blood

tested every None of these tests have ever detected anything out of the ordinary

FINDINGS AND ANALYSIS

Respondent is charged with duplicating and utilizing a Department parking permit without permission or authority to do so. Respondent admitted to making a copy of his parking permit in 2007 because he wanted to have a permit for both of his cars. In 2009, he was still using the duplicated 2007 permit when he parked at a bus stop near court because he did not want to be late for a grand jury appearance. Respondent did not realize that his conduct was improper.

Because Respondent pleaded Guilty to this Specification, he is found Guilty.

Respondent is also charged in two specifications with possessing and ingesting marijuana without police necessity or authority after a random test revealed the presence of marijuana in his hair. The Court finds Respondent Guilty of both of these specifications.

Dr. Thomas Cairns of the Psychomedics Corporation testified that when a person ingests marijuana, it enters the liver where it becomes metabolized. The marijuana is then converted to a metabolite called carboxy tetrahydrocannabinol (THC). The circulatory system brings the THC to the base of the hair follicle, where the metabolite becomes trapped grows. He stated that THC is unique to marijuana, and since the metabolite is not present in marijuana smoke, it cannot be caused by external contamination, with the possible exception of unusual sexual practice.

Cairns testified that THC was present in Respondent's hair at levels well above the mass spectrometry cutoff which is one pictogram per ten milligrams (10 pg/10mg) of hair

According to Cairns, Respondent's first sample collected on October 14, 2009 was a presumptive positive and confirmed by mass spectrometry at a level of 60 pg/10mg, more than six times the administrative cutoff. Mass spectrometry on the second sample had an identical result of 60 pg/10mg. Cairns testified that the results meant that Respondent ingested marijuana on multiple occasions prior to the date of collection. He further testified that the hair samples taken from Respondent had a "look-back period" of several months from the date of collection, October 14, 2009. This is the period charged in the Specifications: July 14, 2009 to October 14, 2009.

Respondent testified that on the date of collection when he was taken into the testing room, there was already a sheet of paper on the table and he never observed the hair collector, Arayaes, wipe the table down with alcohol. Respondent said both he and Arayaes agreed that the hair sample would be taken from his leg. He stated that Arayaes sprayed his leg with alcohol, but did not spray the razor. Respondent said that he did not see him cutting his hair because Arayaes stood in front of him blocking his view. Respondent described Arayaes as disorganized and nervous.

Arayaes testified that he has worked in the Drug Screening Unit for the past eight years. He received training on hair collection from both the Department and Psychomedics. Before becoming certified to collect hair samples, he was required to pass a test. Arayaes estimated that he collects 40 hair samples each week. He stated that he had an independent recollection of taking Respondent's hair sample because Respondent was quiet during the collection process. He remembered taking three hair samples and

two urine samples from Respondent. He also recalled that Respondent said he was "going to be a while" when it was time to collect the urine samples.

Arayaes explained that before any samples are taken from a member of the [redacted] identity is verified against his Department identification card. He further stated that in the testing room there are two tables in separate corners of the room. A table is cleaned with alcohol and covered with fresh paper before samples are taken. He said that both the leg and the razor are sprayed with alcohol if hair is being taken from the leg. He noted that a new razor is used for each hair collection. Once enough hair is taken for three samples, each sample is wrapped in foil and placed in a sample acquisition card. The samples are then closed with security seals, placed in a plastic bag which also gets sealed. The member initials the sample acquisition cards and the plastic bags (see Laboratory Data Package DX 2). Arayaes testified that the member also signs the Custody and Control Forms and the collector's hands are gloved throughout the process.

Arayaes testified that at no point during the hair collection process did Respondent object that he could not see, ask any questions about the process or express concern. Arayaes said two of the three samples were sent to Psychemedics. Once the Respondent tested positive, he had the opportunity to send his third sample to a different laboratory for testing. He stated that to his knowledge, Respondent never opted to have the third sample tested. Arayaes further testified that Respondent was the first person that he collected samples from that day.

In terms of whether Respondent's razor was sprayed with alcohol, Respondent testified that his view of his hair shaving was blocked by Arayaes's body. In addition,

during his official Department interview held in F.
he was not really paying attention during the collection. He did, however, feel the razor on his leg as Arayaes collected the samples. Respondent also suggested that because the foils were not full with hair collected, that possibly an inadequate amount of hair was collected. Arayaes testified credibly that even though the hair did not fill the foil, he knew based on his experience that the samples collected were sufficient to conduct the tests, otherwise Psychemedics would have been unable to do the testing.

The potential for any cross-contamination is reduced given these factors that Respondent's leg was sprayed with alcohol, Arayaes's hands were gloved, a new razor was used, and Respondent was the first collection of the day for Arayaes. In addition, Respondent stated in his official Department interview that he was really not paying attention to the hair collection process. For all these reasons, the Court finds that there was no real challenge to the hair collection process. This is separate and apart from the rigorous testing procedures utilized by Psychemedics which will be discussed.

Respondent testified that after the hair collection, he bent down to tie his boot. By the time he picked up his head 15 seconds later, the samples had been packaged and he never actually saw the samples being placed in the foils. Respondent along with Arayaes, however, signed the Custody and Control Form for each sample (see Laboratory Data Package, DX 2). Aside from these statements, Respondent offered no other explanation for his positive drug results. He

testified that he had a lot of time on the books and if he felt the need to smoke marijuana, he would have retired first, but he had no desire to smoke marijuana. In addition, he stated that he used one drug for his [REDACTED]. He also used supplements

Respondent denied that he ever investigated whether any of the supplements he used could contain anything related to marijuana

He offered the character testimony of Mills who testified that Respondent was her platoon commander at the 48 Precinct. She testified that Respondent was straight and narrow, 'health conscious, ate healthy foods, and worked out everyday on his meal break. They discussed their shared dislike for smokers and she never saw Respondent unfit for duty or unkempt. Mills also testified that aside from precinct functions off duty, she did not socialize with Respondent. She could not speak about Respondent's habits when they were apart and did not know what his life was like outside of work.

The Court rejects Respondent's arguments and finds that the Department proved through the Psychomedics test results that Respondent ingested marijuana. See Matter of McBride v Kelly, 215 A D 2d 161 (1st Dept. 1995) (substantial evidence that officer ingested cocaine was provided by immunoassay and mass spectrometry). Disciplinary Case No. 85554/09, signed January 5, 2011 (Department proved through Psychomedics and third Quest test results that Respondent ingested marijuana). After Respondent's sample was deemed a 'presumptive positive' following the screening test called radioimmunoassay, Respondent's hair sample was washed three times to remove any potential external contaminants. The hair was dissolved and then went through mass spectrometry. Cairns testified that mass spectrometry is constantly evolving and the instruments are more sensitive and efficient. / the Court finds there was no credible challenge to the laboratory procedures utilized by Psychomedics.

Because the Department demonstrated that Respondent ingested and thus possessed marijuana, without police necessity or authority, the Court finds him Guilty.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined See Matter of Pell v Board of Education, 34 N Y 2d 222, 240 (1974) Respondent was appointed to the Department on July 8, 1985 Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum

Respondent has been found Guilty of duplicating and utilizing a Department parking permit without permission or authority to do so In addition, Respondent has been found Guilty of possession and ingestion of marijuana without police necessity or authority The Department has a strong interest in not employing persons who ingest and possess illegal drugs like marijuana Accordingly, the Court recommends that the

See Disciplinary

Case No 85554/09 signed January 5, 2011 (16-year member with no prior disciplinary record is dismissed from the Department for possessing and ingesting marijuana Court rejected Respondent s argument that he may have used marijuana during alcohol-induced blackout;

signed August 3, 2007 (23-year member was terminated from the Department for possessing and ingesting marijuana), confirmed

Kelly, 70 A D 3d 423 (1st Dept 2010), but see Matter of McDougall v Scoppetta, 76 A D 3d 338, 905 N Y S 2d 262 (2d Dept 2010)

APPROVED
NOV 10 2011
Raymond W. Kelly
RAYMOND W KELLY
POLICE COMMISSIONER

Respectfully submitted,

Claudia Daniels-DePeyster
Claudia Daniels-DePeyster
Assistant Deputy Commissioner – Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From Assistant Deputy Commissioner – Trials
To Police Commissioner
Subject CONFIDENTIAL MEMORANDUM
LIEUTENANT JERALD LAVERY
TAX REGISTRY NO 913157
DISCIPLINARY CASE NOS 85226/09 & 85876/09

In 2006-2008, Respondent received an overall rating of 4.0 “Highly Competent” on his annual performance evaluations. He has been awarded two medals for Excellent Police Duty, two medals for Meritorious Police Duty and one Commendation.

[REDACTED]
[REDACTED] Respondent has no prior formal disciplinary record.

For your consideration.



Claudia Daniels-DePeyster
Assistant Deputy Commissioner – Trials